

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| AT&T CORP., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | CIVIL ACTION No. 99-4975 |
| |) | |
| PUBLIC SERVICE ENTERPRISES OF |) | |
| PENNSYLVANIA, INC., et al., |) | |
| |) | |
| Defendants. |) | |

MEMORANDUM

Padova, J. April , 2000

This matter arises on various motions filed by both parties. The Court held oral argument on these motions on April 7, 2000. These matters are fully briefed and ready for decision.

I. BACKGROUND

AT&T provides telecommunications services, including long-distance telephone services. From 1991 to 1996, Public Service Enterprises of Pennsylvania, Inc. ("PSE"), purchased long-distance services from AT&T. In exchange for committing to purchase large volumes of such services, PSE obtained steep discounts from AT&T. A series of disputes arose between AT&T and PSE, and in July 1996, they agreed to settle these disputes by means of an arbitration proceeding. In August 1998, the arbitrators awarded \$26 million to AT&T. The arbitration award was confirmed by the U.S. District Court for the Southern District of New York on September 8, 1999 ("Judgment"). In October 1999, PSE filed an appeal with the United States Court of Appeals for the Second Circuit:Public Service Enterprises of Pennsylvania, Inc. v. AT&T, United States Court of Appeals for the Second Circuit, Docket No. 99-9192.

AT&T, however, has not collected the Judgment. In the instant Complaint, AT&T alleges that the individual defendants¹ diverted all PSE revenues into another corporation that they owned and controlled, Enterprise Telcom Services, Inc. (“ETS”). PSE allegedly transferred the telecommunication services it received from AT&T to ETS “without fair or reasonably equivalent consideration.” [Complaint ¶26]. AT&T alleges that this corporate structure enabled the individual defendants to convey to ETS and themselves the benefits of the volume commitments PSE made to AT&T without the corresponding liabilities.

In addition, AT&T alleges that the individual defendants stripped real estate assets from PSE after PSE entered into the resale business with AT&T. AT&T alleges that the individual defendants transferred real estate assets or the proceeds of these assets to themselves, their families, or other entities under their ownership or control. [Complaint ¶¶28-29]. AT&T alleges that these transfers were “without fair consideration,” and left PSE “grossly undercapitalized for the business in which it was engaged.” [Complaint ¶¶28-30]. PSE, however, continued to purchase long distance services from AT&T, and allegedly increased its commitments to AT&T through June 1994. [Complaint ¶¶32-34].

In July 1994, ETS sold its assets to a new limited partnership, New Enterprises Wholesale Services, L.P. (“NEWS”). Like ETS, NEWS allegedly purchased the long distances services from PSE “without fair or reasonably equivalent consideration.” [Complaint ¶37]. AT&T alleges that the sale of ETS' assets to NEWS, and PSE's continued transfer of services to NEWS caused the

¹ AT&T names four individual defendants: William B. Sordoni, Charles E. Parente, Patrick A. Bello and Frank G. Scardino. AT&T alleges that in 1991, PSE was a wholly-owned subsidiary of Sordoni Enterprises, which in turn was owned by a holding company in which Defendants Sordoni, Parente, and two brothers of Sordoni are the sole shareholders. AT&T alleges that Bello and Scardino “held beneficial interests in PSE from at least the end of 1991 forward.” [Complaint ¶15]. In addition, Sordoni, Parente and Scardino were officers of PSE, and Sordoni and Parente were directors of PSE. [Complaint ¶7].

individual defendants to receive approximately \$13 million “which in equity belongs to PSE.” [Complaint ¶38].

As a result of these alleged actions, AT&T claims that PSE has insufficient assets to pay the Judgment. On October 5, 1999, AT&T registered the Judgment in this Court. AT&T subsequently filed this action on October 7, 1999. AT&T brings five counts against Defendants. In Count I, AT&T seeks to enforce the Judgment against PSE by means of assigning PSE's right to an action against the individual defendants for breach of fiduciary duty to AT&T. AT&T then brings Count II as the assignee of PSE, pursuant to Fed. R. Civ. P. 18(b), for breach of fiduciary duty against the individual defendants. In Counts III and IV, AT&T brings fraudulent conveyance claims against the individual defendants. Finally, in Count V, AT&T seeks to hold the individual defendants personally liable for the Judgment based on fraud, or piercing the corporate veil.

By Order dated January 19, 2000, the Court consolidated this action with Cause No. 99-6099 (“PSE Complaint”). In the PSE Complaint, PSE claims that the AT&T action breaches the release and confidentiality provisions of the Arbitration Agreement. PSE asks the Court to enjoin AT&T from proceeding with the original action.

II. MOTIONS TO DISMISS

The Court faces two motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. AT&T moves to dismiss the PSE Complaint, and PSE moves to dismiss Counts I and II of the AT&T Complaint.

A. STANDARD

The purpose of a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of the complaint. Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A claim may be dismissed under Rule 12(b)(6)

only if it appears beyond doubt that the plaintiff could prove no set of facts in support of the claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering such a motion, a Court must accept all of the facts alleged in the complaint as true and must liberally construe the complaint in the light most favorable to the plaintiff. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The question is not whether the plaintiff will ultimately prevail, but whether he is entitled to present evidence in support of his claims. Scheuer v. Rhodes, 416 U.S. at 236.

B. PSE Complaint

AT&T moves to dismiss the PSE Complaint on two grounds. First, AT&T argues that the Arbitration Agreement permits the use of confidential information for the purposes of the arbitration. AT&T submits that its action constitutes a continuation of the arbitration proceeding in that it seeks to enforcement the arbitration Judgment. Second, AT&T contends that PSE waived its confidentiality interests by placing the arbitration transcript in the district court record.

In response, PSE contends that because the arbitration transcript physically was not filed with the Southern District of New York, but rather retained by counsel, the transcript never became public record. Further, PSE argues that the AT&T Complaint is not a continuation of the arbitration action, but rather a new lawsuit stating new legal theories against the defendants.

The Court will grant AT&T's Motion to Dismiss. The Court concludes that this case, though novel, is in essence an effort to collect the underlying Judgment. As such, the AT&T Complaint clearly represents a continuation of the arbitration proceeding. Thus, the use of any allegedly confidential information in the AT&T Complaint is authorized under the Arbitration Agreement. (Arbitration Agreement §9.1).

Furthermore, this case arrived before the undersigned following a prolonged history before colleagues in New York. In both the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, both parties made numerous public filings which related the facts and history of their dispute. Moreover, the transcripts of the evidentiary hearing, admitted to the record by Judge Loretta A. Preska by Order dated January 5, 1999, are publicly available judicial records. Littlejohn v. BIC Corp., 851 F.2d 673, 681-83 (3d Cir. 1988). PSE submits that because the arbitration transcript was not “admitted into evidence,” the transcript is not a part of the record. This argument, however, is without merit. “The common law right of access is not limited to evidence, but rather encompasses all judicial records and documents.” Republic of the Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 659 (3d Cir. 1991)(internal citations and quotations omitted). Indeed, on appeal to the Second Circuit, PSE's counsel acknowledged that “[a] transcript of the arbitration proceedings. . . is part of the record in the district court.” [AT&T's Motion to Dismiss, Ex. 8]. PSE never requested that the transcript be admitted conditionally, or be maintained under seal based on its present confidentiality concerns. Cf. United States v. Amodeo, 71 F.3d 1044 (2d Cir. 1995)(concluding that while report filed with court was judicial document, right of public access was limited because report was filed under seal). Rather, it appears to the Court that PSE requested that the transcript copies be maintained by counsel as a matter of convenience due to the immense size of the transcript, namely eighteen volumes. (See AT&T Motion to Dismiss, Ex. 3). Accordingly, the Court concludes that to the extent PSE seeks to use the confidentiality provision of the Arbitration Agreement to bar the AT&T Complaint, PSE has waived any such confidentiality interests.²

²The Court expresses no opinion on whether the confidentiality provision remains in effect and governs other issues and transactions between the parties. Rather, the Court's opinion addresses the sole issue presented in AT&T's Motion to Dismiss: whether the confidentiality

PSE separately raises the release provision of the Arbitration Agreement as ground for the injunctive relief sought in its Complaint. The Court, however, concludes that the release provision can be pled as an affirmative defense to the AT&T Complaint, and presented to the Court in the form of a Motion for Partial Summary Judgment. PSE, thus, has an adequate remedy at law, and the Court will not resort to its equitable powers when legal relief is available. Younger v. Harris, 401 U.S. 37, 43-44 (1971) (“[C]ourts of equity should not act. . . when the moving party has an adequate remedy at law.”).

Accordingly, the Court will dismiss Cause No. 99-6099, and deny PSE's Motion for Injunctive Relief as moot.

C. AT&T Complaint

In Count I of its Complaint, AT&T brings the following claim:

40. On information and belief, PSE has unliquidated assets, including a cause of action against the Individual Defendants for breaches of fiduciary duties by Sordoni, Parente, and Scardino, and for the aiding and abetting, conspiracy and/or participation in such breaches by Bello.

41. Because PSE has not satisfied the Judgment, AT&T is entitled to an order requiring PSE to assign its rights in any such causes of action to AT&T, either directly or through a sheriff's sale, with the proceeds of such causes of action, or their sale, to be applied by AT&T in partial or full satisfaction of the Judgment.

42. Through discovery, AT&T believes it may locate other assets of PSE which can be used to satisfy the Judgment.

WHEREFORE, AT&T prays for judgment on Count I against PSE as follows:

(a) That the Court order PSE to assign to AT&T, either directly or through a sheriff's sale, all of its right, title, and interest in and to any and all causes of action it has or may have against the Individual Defendants and any other persons acting in concert with them; and

provision prohibits AT&T from proceeding with Cause No. 99-4975 in this Court.

(b) That the Court order PSE to turn over to AT&T, either directly or through a sheriff's sale, all other assets of PSE that may be discovered by AT&T during the course of his proceeding until such time as the Judgment is satisfied.

(Complaint ¶¶41-42).

In their Motion to Dismiss, PSE and the individual defendants (collectively referred to as “PSE”) argue that this involuntary assignment of PSE's alleged tort claims against its principals has no basis in Pennsylvania law. PSE contends that the process for enforcing the Judgment is by writ of execution under Rule 69(a) of the Federal Rules of Civil Procedure.

In response, AT&T argues that Pennsylvania law allows a judgment creditor to attach a judgment debtor's intangible property. The Court disagrees. Rule 3108 of the Pennsylvania Rules of Civil Procedure allows service of a writ of execution on intangible property by serving a garnishee. Pa. R.Civ. P. 3108(4). Yet, one case here in the United States District Court for the Eastern District of Pennsylvania, and one Pennsylvania Superior Court case both hold that unliquidated claims for tort or breach of contract are not subject to garnishment. In re Pierson, Inc., 44 B.R. 556, 559 (E.D. Pa. 1984); Brown v. Candelora, 708 A.2d 104 (Pa. Super. Ct. 1998). As the Pierson Court explained, “only such debts as are not dependent upon a contingency but are certain and payable are properly attachable in a garnishment proceedings.” Pierson, 44 B.R. at 559.

PSE directs the Court's attention to National Recovery Systems v. Pinto, 18 Pa. D. & C. 3d 684 (C.P. Bucks 1981). Interpreting Rule 3118 of the Pennsylvania Rules of Civil Procedure, the National Recovery Systems Court denied the plaintiff's request to assign defendant's interest in a corporation and a mortgage to the plaintiff. The Court finds National Recovery Systems persuasive, and concludes that Pennsylvania law does not support AT&T's requested assignment in Count I.

AT&T suggests that the Court's “inherent powers” support Count I and cites in support In re Estate of Marcos, 910 F.Supp. (D. Haw. 1995). In Marcos, the judgment debtor had approximately

\$320 million deposited in Swiss bank accounts, but failed to make any effort to satisfy the \$1.2 billion judgment entered against it. Applying California law, the Marcos Court assigned the judgment debtor's interest in the Swiss bank account to the judgment's creditor. Marcos is thus readily distinguishable from the instant case because it involved the assignment of a fixed sum of money, not an unliquidated chose in action. Accordingly, Marcos does not support AT&T's position.

Other cases relied upon by AT&T are also inapposite. In Ikuno v. Yip, 912 F.2d 306 (9th Cir. 1990), the plaintiff purchased all of the third-party's right in "all choses in action and claims of any kind or nature." Id. at 313 n. 9. Moreover, the sheriff's sale specifically named the potential defendant. Likewise, Bergen v. F/V St. Patrick, 686 F.Supp. 786 (D. Ala. 1988), permits disposal of a judgment debtor's acknowledged chose in action by writ of execution at a sheriff's sale, but expressly precludes an involuntary assignment of such claims. Similarly, in Denham v. Farmers Ins. Co., 262 Cal. Rptr. 146 (Cal. App. 1989), the plaintiff-judgment creditor first obtained the right to the judgment-debtor's chose in action against its insurer by writ of execution.

None of the cases cited by AT&T persuade the Court that Pennsylvania law allows a judgment-creditor to obtain a judgment-debtor's unacknowledged and unliquidated chose in action in this manner. The Court, therefore, will grant PSE's Motion to Dismiss as to the requested assignment.

AT&T, however, submits that Count I "generally seeks to discover what other assets PSE may possess and to execute upon those assets in satisfaction of the judgment." AT&T contends that such discovery is permitted under Pennsylvania Rules. Thus, AT&T submits that even if AT&T's requested assignment of PSE's claims against its officers is prohibited, Count I states a claim for relief. The Court disagrees. AT&T has not invoked the proper procedure for seeking discovery in aid of execution. See Pa. R. Civ. P. 3117.

In accordance with the foregoing, the Court will dismiss Count I in its entirety. Furthermore, as Count II is dependent on Count I, the Court will dismiss Count II as well.

II. MOTION TO SEAL RECORD

PSE moves the Court to seal the record in Cause No. 99-4975 because the Arbitration Agreement's confidentiality provision prohibits use of confidential information. The Court appreciates PSE's confidentiality concerns, but finds that these issues do not provide grounds for sealing the entire case. The parties' confidentiality concerns are fully protected by their ability to designate any filing or portion thereof as "confidential," and filing such pleadings or section under seal. To the extent that confidential materials are contained only in an exhibit or an appendix to any court filing, only such exhibit or appendix shall be filed under seal. Accordingly, the Court will deny PSE's Motion to Seal.

III. MOTION TO STAY

Finally, Defendant Scardino filed a Motion to Stay on March 23, 2000, asking the Court to stay trial of this action pending resolution of the PSE appeal by the United States Court of Appeals for the Second Circuit. The other defendants join in this request, and further ask the Court to stay discovery. AT&T opposes this request, and submits that a stay would prejudice it by delaying collection of the Judgment.

The Court has inherent power to control its docket in order to conserve scarce judicial resources. Cost Bros., Inc. v. Travelers Indemnity Co., 760 F.2d 58, 60 (3d Cir.1985). Giving due regard to the desirability of resolving litigation comprehensively and conserving judicial resources, the Court ultimately must determine what is the most wise course of judicial administration under all the circumstances. The pending appeal brings the validity of the arbitration award itself into question. At oral argument, Plaintiff's counsel agreed that a reversal by the Second Circuit would

render all proceedings in this Court moot. The Court concludes that the efficient and equitable solution would be to stay the present litigation pending a decision by the United States Court of Appeals for the Second Circuit. Staying the instant action avoids a potentially gross waste of judicial resources. Moreover, the Court perceives no prejudice to AT&T in that interest continues to run on the Judgment. Accordingly, the Court will grant Defendants' Motion to Stay, and place this case in civil suspense.

Appropriate Orders follow.

John R. Padova

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PUBLIC SERVICE ENTERPRISES OF
PENNSYLVANIA, et al.,

Plaintiffs,

vs.

AT&T CORP.,

Defendant.

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CIVIL ACTION No. 99-6099

ORDER

AND NOW, this day of April, 2000, in accordance with the Memorandum
entered this date, **IT IS HEREBY ORDERED** that

1. AT&T's Motion to Dismiss (docket #7) is **GRANTED**.
2. PSE's Motion to Seal Record (docket #2) is **DENIED**.
3. All pending motions are **DENIED** as moot.
4. The Clerk shall mark Cause No. 90-6099 **CLOSED** for statistical purposes.

BY THE COURT:

John R. Padova